

Monroe County Athenaeum

S P E E C H

9033

OF THE

HON. JOHN MARSHALL,

DELIVERED IN THE

HOUSE OF REPRESENTATIVES,

OF THE

UNITED STATES,

ON THE RESOLUTIONS OF THE

HON. EDWARD LIVINGSTON,

RELATIVE TO

THOMAS NASH,

ALIAS

JONATHAN ROBBINS.

PHILADELPHIA:

PRINTED AT THE OFFICE OF
"THE TRUE AMERICAN,"

1800.



S P E E C H, &c.

MR. MARSHALL said, believing, as he did most seriously—that in a government constituted like that of the United States, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood:—On rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it:—he could not but have been highly gratified with the very eloquent,—and what was still more valuable, the very able, and very correct argument,—which had been delivered by the gentleman from Delaware (Mr. Bayard) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal, but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject, but, as the argument in opposition to the resolutions had been assailed, with

considerable ability, by gentlemen of great talents, he trusted the house would not think the time misapplied, which would be devoted to the re-establishment of the principles contained in that argument, and to the refutation of those advanced in opposition to it. In endeavouring to do this, he should notice the observations in support of the resolutions, not in the precise order in which they were made, but as they applied to the different points he deemed it necessary to maintain, in order to demonstrate, that the conduct of the executive of the United States, could not justly be charged with the errors imputed to it by the resolutions.

His first proposition, he said, was that the case of Thomas Nash, as stated to the President, was completely within the 27th article of the treaty of amity, commerce, and navigation, entered into between the United States of America and Great Britain.

He read the article and then observed—The *casus fœderis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

The case stated is, that Thomas Nash, having committed a murder on board a British Frigate, navigating the high seas under a commission from his Britannic Majesty, had

sought an asylum within the United States, and on this case his delivery was demanded by the minister of the King of Great Britain.

It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation.

That such a murder is within their jurisdiction, has been fully shown by the gentleman from Delaware. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported every where by public opinion, and is recognized by writers on the law of nations. Rutherford in his second volume page 180 says, "The jurisdiction which a civil society has over the persons of its members, affects them immediately, whether they are within its territories or not."

This general principle is especially true, and is particularly recognized, with respect to the fleets of a nation on the high seas. To punish offences committed in its fleet, is the practice of every nation in the universe; and consequently the opinion of the world is, that a fleet at sea, is within the jurisdiction of the nation to which it belongs. Rutherford 2. vol. page 491, says. "There can be no doubt about the jurisdiction of a nation over the persons, which compose its fleets, when they are out at

sea, whether they are sailing upon it, or are stationed in any particular part of it."

The gentleman from Pennsylvania, (Mr. Gallatin) tho' he has not directly controverted this doctrine, has sought to weaken it, by observing, that the jurisdiction of a nation at sea could not be compleat even in its own vessels;—and in support of this position he urged the admitted practice, of submitting to search for contraband—a practice not tolerated on land, within the territory of a neutral power. The rule is as stated; but is founded on a principle which does not affect the jurisdiction of a nation over its citizens or subjects in its ships. The principle is, that in the sea, itself, no nation has any jurisdiction. All may equally exercise their rights, and consequently the right of a belligerent power to prevent aid being given to his enemy, is not restrained by any superior right of a neutral in the place. But if this argument possessed any force, it would not apply to national ships of war, since the usage of nations does not permit them to be searched.

According to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation.

Altho such a murder is plainly within the letter of the article, it has been contended not to be within its just construction, because at sea, all nations have a common jurisdiction, and the

article correctly construed, will not embrace a case of concurrent jurisdiction.

It is deemed unnecessary to controvert this construction, because the proposition—that the United States had no jurisdiction over the murder committed by Thomas Nash, is believed to be completely demonstrable.

It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself. This principle is laid down in 2d. Ruth. 488, and 491.

The American government has on a very solemn occasion, avowed the same principle. The first minister of the French republic asserted and exercised powers of so extraordinary a nature, as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such, as necessarily to occasion a very serious and mature consideration of the opinions it should adopt. Of consequence, the opinions then declared, deserve great respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens, in order to cruize against nations with whom America was at peace. In reasoning against this extravagant claim, the then secretary of state, in his letter of the 17th of June, 1793, says “For our citizens then to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the executive and to those whom they consulted, as much

against the laws of the land, as to murder or rob, or combine to murder or rob, its own citizens; and as much to require punishment, if done, within their limits, where they have a territorial jurisdiction, or on the high seas, where they have a *personal jurisdiction*, that is to say, one which reaches *their own citizens only*; this being an *appropriate part* of each nation, on an element where all have a common jurisdiction."

The well considered opinion then of the American government on this subject is, that the jurisdiction of a nation at sea is *personal*, "reaching its *own citizens only*," and that this is "*the appropriate part* of each nation" on that element.

This is precisely the opinion maintained by the opposers of the resolutions. If the jurisdiction of America at sea be personal—reaching its own citizens only, if this be its appropriate part, then the jurisdiction of the nation cannot extend to a murder committed by a British sailor, on board a British frigate navigating the high seas under a commission from his Britannic majesty.

As a further illustration of the principle contended for, suppose a contract made at sea, and a suit instituted for the recovery of money which might be due thereon. By the laws of what nation would the contract be governed? The principle is general, that a personal contract follows the person, but is governed by the law of the place where it is formed. By what law then would such a contract be governed! If all nations had jurisdiction over the place, then the laws of all nations would equally influence the contract but certainly no man will hesitate

to admit, that such a contract ought to be decided according to the laws of that nation, to which the vessel or contracting parties might belong.

Suppose a duel attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws, or tribunals, of any other nation whatever.

Suppose a private theft by one mariner from another and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime; and are equally authorized to punish it?

If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet all gentlemen will disclaim this power. It follows then that no such common jurisdiction exists.

In truth the right of every nation to punish, is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate under the law of nations, is an enemy of the human race. Being the enemy of all he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruizing on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation.

It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas.

A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable.

It had been observed by his colleague (Mr. Nicholas) for the purpose of showing that the distinction taken on this subject by the gentleman from Delaware, (Mr. Bayard) was inaccurate, that any vessel robbed on the high seas, could be the property only of a single nation, and being only an offence against that nation, could be, on the principle taken by the opposers of the resolutions no offence against the law of nations: But in this his colleague had not accurately considered the principle. As a man, who turns out to rob.

on the high way, and forces from a stranger his purse with a pistol at his bosom, is not the particular enemy of that stranger, but alike the enemy of every man who carries a purse, so those, who, without a commission, rob on the high seas, manifest a temper hostile to all nations, and therefore become the enemies of all. The same inducements which occasion the robbery of one vessel, exist to occasion the robbery of others, and therefore the single offence is an offence against the whole community of nations, manifests a temper hostile to all, is the commencement of an attack on all, and is consequently, of right, punishable by all.

His colleague had also contended that all the offences at sea, punishable by the British Statutes from which the act of Congress was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among these, consequently murder was an act of piracy by the law of nations, and therefore punishable by every nation. In support of this position he had cited 1. Hawk. P. C. 267 and 271. 3d Inst. 112 and 1st Woodson 140.

The amount of these cases is, that no new offence is made piracy by the statutes; but that a different tribunal is created for their trial, which is guided by a different rule, from that which governed, previous to those Statutes. Therefore, on an indictment for piracy, it is still necessary to prove an offence which was piracy before the Statutes. He drew from these authorities a very different conclusion from that which had been drawn by his colleague. To show the correctness of his con-

conclusion, it was necessary to observe, that Statute did not indeed change the nature of piracy since it only transferred the trial of the crime to a different tribunal, where different rules of decision prevailed, but having done this, other crimes committed on the high seas, which were not piracy, were made punishable by the same tribunal, but certainly this municipal regulation could not be considered as proving, that those offences were before, piracy by the law of nations. Mr. Nicholas insisted that the law was not correctly stated, whereupon Mr. Marshall called for 3d inst. and read the statute.

“ All treasons, felonies, robberies, murders, and confederacies committed in or upon the seas, &c. shall be enquired, tried, heard, determined and judged in such shires, &c. in like form and condition as if any such offence had been committed on the land, &c.”

“ And such as shall be convicted &c. shall have and suffer such pains of death, &c. as if they had been attainted of any treason, felony, robbery, or other the said offences done upon the land.”

This statute it is certain, does not change the nature of piracy, but all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, are not declared to have been, nor are they, piracies. If a man be indicted as a pirate, the offence must be shown to have been piracy before the statute, but if he be indicted for treason, felony, robbery, murder, or confederacy committed at sea, whether such offence was or was not a piracy, he shall be punished in like manner as if he had committed

the same offence at land. The passage cited from 1. Woodison 140, is a full authority to this point. Having stated that offences committed at sea were formerly triable before the Lord high Admiral, according to the course of the Roman civil law, Woodison says but by the Statutes 27. H. 8th. C. 4. and 28. H. 8. C. 15. all treasons, felonies, piracies and other crimes committed on the sea or where the Admiral has jurisdiction, shall be tried in the realm as if done on land." But the Statutes referred to affect only the manner of the trial *so far as respects piracy*. The nature of the offence is not changed. Whether a charge amounts to piracy or not, must still depend on the law of nations; except where, *in the case of British subjects*, express acts of Parliament have declared that the crimes therein specified shall be adjudged piracy, or shall be liable to the same mode of trial and degree of punishment."

This passage proves not only that all offences at sea are not piracies by the law of nations, but also that all indictments for piracy must depend on the law of nations, "except where, *in the case of British subjects*, express acts of Parliament" have changed the law. Why do not these "express acts of Parliament" change the law as to others than "British subjects"? The words are general—"All treasons, felonies &c." Why are they confined in construction to British subjects? The answer is a plain one. The jurisdiction of the nation is confined to its territory and to its subjects.

The gentleman from Pennsylvania [Mr. Gallatin] abandons, and very properly abandons, this untenable ground. He admits that no nation has a right to punish offences against another nation, and that the United States can only punish offences against their own laws, and the laws of nations. He admits too, that if there had only been a mutiny [and consequently if there had only been a murder] on board the *Hermoine*, that the American courts could have taken no cognizance of the crime. Yet mutiny is punishable as piracy by the law of both nations. That gentleman contends that the act committed by Nash was piracy according to the law of nations. He supports his position by insisting, that the offence may be constituted by the commission of a single act, that unauthorized robbery on the high seas is this act, and that the crew having seized the vessel and being out of the protection of any nation, were pirates.

It is true that the offence may be complete by a single act—but it depends on the nature of that act. If it be such as manifests general hostility against the world, an intention to rob generally, then it is piracy; but if it be merely a mutiny and murder in a vessel, for the purpose of delivering it up to the enemy, it seems to be an offence against a single nation, and not to be piracy. The sole object of the crew might be to go over to the enemy, or to free themselves from the tyranny experienced on board a ship of war, and not to rob generally.

But should it even be true, that running away with the vessel to deliver her up to an enemy, was an act of general piracy, punishable by all nations, yet the mutiny and murder was a distinct offence.—Had the attempt to seize the vessel failed, after the commission of the murder, then, according to the argument of the gentleman from Pennsylvania, the American courts could have taken no cognizance of the crime. Whatever then might have been the law respecting the piracy, of the murder there was no jurisdiction. For the murder, not the piracy, Nash was delivered up. Murder, and not piracy, is comprehended in the 27th article of the treaty between the two nations. Had he been tried then, and acquitted on an indictment for the piracy, he must still have been delivered up for the murder, of which the court could have no jurisdiction. It is certain that an acquittal of the piracy, would not have discharged the murder; and therefore in the so-much relied on trials at Trenton, a separate indictment for murder was filed, after an indictment for piracy. Since then, if acquitted for piracy, he must have been delivered to the British government on the charge of murder, the President of the United States might, very properly, without prosecuting for the piracy, direct him to be delivered up on the murder.

All the gentlemen who have spoken in support of the resolutions, have contended that the case of Thomas Nash is within the purview of the act of Congress, which relates to this subject, and is, by that act, made punishable in the American courts. That is, that the act of Congress designed to punish crimes committed on board a British frigate.

Nothing can be more completely demonstrable than the untruth of this proposition.

It has already been shewn, that the legislative jurisdiction of a nation, extends only to its own territory, and to its own citizens, wherever they may be. Any general expression in a legislative act, must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act. Of consequence, an act of Congress can only be construed to apply to the territory of the United States, comprehending every person within it, and to the citizens of the United States.

But independent of this undeniable truth, the act itself affords complete testimony of its intention and extent. [See Laws of the U. S. vol. 1. p. 100.]

The title is, "An act for the punishment of certain crimes against the United States." Not against Britain—France—or the World;—but singly "against the United States."

The first section relates to treason, and its objects are "any person or persons owing allegiance to the United States." This description comprehends only the citizens of the United States, and such others as may be on its territory, or in its service.

The second section relates to mis-prison of treason, and declares, without limitation, that any person or persons, having knowledge of any treason, and not communicating the same, shall be guilty of that crime. Here then is an instance of that limited description of persons in one section, and of that general description in another, which has been relied on to support

the construction contended for by the friends of the resolutions. But will it be pretended that a person can commit mis-prison of treason, who cannot commit treason itself? That he would be punishable for concealing a treason, who could not be punished for plotting it? Or can it be supposed that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the United States, and should not cross the Atlantic to reveal them?

The same observations apply to the 6th section which makes "any person or persons" guilty of mis-prison of felony, who having knowledge of murder or other offences enumerated in that section, should conceal them. It is impossible to apply this to a foreigner, in a foreign land, or to any person not owing allegiance to the United States.

The 8th section, which is supposed to comprehend the case, after declaring that if any person or persons shall commit murder on the high seas, he shall be punishable with death, proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate, and a felon.

The persons who are the objects of this section of the act, are all described in general terms, which might embrace the subjects of all nations. But it is to be supposed, that if, in an engagement between an English and a French

ship of war, the crew of the one or the other, should lay violent hands on the captain, and force him to strike, that this would be an offence against the act of Congress, punishable in the courts of the United States? On this extended construction of the general terms of the section, not only the crew of one foreign vessel forcing their captain to surrender to another, would incur the penalties of the act, but if in the late action between the gallant Truxton and a French frigate, the crew of that frigate had compelled the captain to surrender, while he was unwilling to do so, they would have been indictable as felons in the courts of the United States. But surely the act of Congress admits of no such extravagant construction.

His colleague, Mr. Marshall said, had cited, and particularly relied on the 9th section of the act. That section declares, that if a citizen shall commit any of the enumerated piracies, or any act of hostility on the high seas, against the United States, under color of a commission from any foreign Prince or State, he shall be adjudged a pirate, felon and robber, and shall suffer death.

This section is only a positive extension of the act to a case, which might otherwise have escaped punishment. It takes away the protection of a foreign commission, from an American citizen who, on the high seas robs his countrymen. This is no exception from any preceding part of the law, because there is no part which relates to the conduct of vessels commissioned by a foreign power; it only proves that, in the opinion of the legislature,

the penalties of the act could not, without this express provision, have been incurred by a citizen holding a foreign commission.

It is then most certain, that the act of Congress does not comprehend the case of a murder committed on board a foreign ship of war.

The gentleman from New-York has cited 2d Woodison 428, to show that the courts of England extend their jurisdiction to piracies committed by the subjects of foreign nations.

This has not been doubted. The case from Woodison is a case of robberies committed on the high seas by a vessel without authority. There are ordinary acts of piracy, which, as has been already stated, being offences against all nations, are punishable by all. The case from 2d Woodison, and the note cited from the same book by the gentleman from Delaware, are strong authorities against the doctrines contended for by the friends of the resolutions.

It has also been contended that the question of jurisdiction was decided at Trenton, by receiving indictments against persons there arraigned for the same offence, and by retaining them for trial after the return of the habeas corpus.

Every person in the slightest degree acquainted with judicial proceedings, knows, that an indictment is no evidence of jurisdiction; and that in criminal cases, the question of jurisdiction will seldom be made, but by arrest of judgement after conviction.

The proceedings after the return of the *habeas corpus*, only prove, that the case was not such a case as to induce the Judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from New-York, that the form of the indictment is, itself, evidence of a power in the court to try the case. Every word of that indictment said the gentleman, gives the lie, to a denial of the jurisdiction of the court.

It would be assuming a very extraordinary principle indeed to say, that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court, should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be, to authorize a court to take cognizance of it, some words in the indictments at Trenton, ought to be noticed. The indictments charge the persons to have been within the peace, and the murder to have been committed against the peace of the United States. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas, are within the peace of the United States, or a murder committed on board such a frigate, against the

peace of any other than the British government.

It is then demonstrated that the murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter, and the spirit, of the 27th article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American Nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder:—to have acquitted and discharged him, would have been a breach of faith and a violation of national duty.

But it has been contended that altho' Thomas Nash ought to have been delivered up to the British Minister, on the requisition made by him in the name of his government, yet the interference of the President was improper.

This Mr. Marshall said led to his second proposition, which was—

That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers stated by the gentleman from New York, and that it was the duty of each department to resist the encroachments of the others.

This being established, the enquiry was, to what department was the power in question allotted?

The gentleman from New-York had relied on the 2d section of the 3d article of the constitution, which enumerates the cases to which the judicial power of the United States extends, —as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material mis-statement of it, made in the resolutions offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all *cases in law and equity* arising under the constitution, laws and treaties of the United States ; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision ; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from New-York, with intentional misrepresentation ; he would not attribute

to him such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not the less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled, and his judgement betrayed into the opinions those resolutions expressed.

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision, may arise under a treaty, where the rights of individuals acquired or secured by a treaty, are to be asserted or defended in court. As under the 4th or 6th article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations, their property within the United States: or as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws, and in the courts of the United States. But the judicial

power cannot extend to political compacts—as the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our treaty with France; or the case of the delivery of a murderer under the 27th article of our present treaty with Britain.

The gentleman from New-York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr. Marshall, but not triumphantly, to retort the question.—By what authority can any court render such a judgement? What power does a court possess to seize any individual, and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts.

Gentlemen have cited and relied on that clause in the constitution, which enables Congress to define and punish piracies, and felonies; committed on the high seas, and offences against the law of nations; together with the act of Congress declaring the punishment of those offences; as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it, did not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences, committed on board a foreign ship, against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurif-

dition to that government. The law therefore cannot act upon the case. But this clause of the constitution cannot be considered and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States of course extends to it. On this principle the courts of admiralty under the Confederation, took cognizance of piracy, altho' there was no express power in Congress to define and punish the offence.

But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction, must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are, cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could consequently transfer no other to their courts, and it has already been proved, that a murder committed on board a foreign ship of war, is not comprehended within this description.

The consular convention with France has also been relied on, as proving, the act of delivering up an individual to a foreign power, to be in its nature judicial and not executive.

The 9th article of that convention authorizes the consuls and vice consuls of either nation, to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice consuls shall address themselves to the courts, judges and officers competent."

This article of the convention does not, like the 27th article of the treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature, is to be performed in the same manner.

It is said that the then President of the United States declared the incompetency of the courts, judges and officers to execute this contract without an act of the legislature. But the then President made no such declaration. He has said that some legislative provision is requisite, to carry the stipulations of the convention into *full* effect. This however is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended that the conduct of the executive on former occasions, similar to this in principle, has been such, as to evince an opinion even in that department, that the case in question is proper for the decision of the courts.

The fact adduced to support this argument is, the determination of the late President, on the case of prizes made within the jurisdiction of the United States, or by privateers fitted out in their ports.

The nation was bound to deliver up those prizes in like manner as the nation is now bound to deliver up an individual demanded under the 27th article of the treaty with Britain. The duty was the same, and devolved on the same department.

In quoting the decision of the executive on that case, the gentleman from New-York has taken occasion to bestow high encomium on the late President, and to consider his conduct as furnishing an example worthy the imitation of his successor.

It must be cause of much delight to the real friends of that great man,—to those who supported his administration while in office, from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it, by those who had been supposed to possess different opinions. If the measure now under consideration, shall be found, on examination, to be the same in principle, with that which has been cited, by its opponents, as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct too may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the Secretary of State, the

one of the 29th of June 1793 to Mr. Genet, and the other of the 16th of August 1793 to Mr. Morris.

In the letter to Mr. Genet, the Secretary says, that the claimant having filed his libel against the ship William, in the court of Admiralty, there was no power which could take the vessel out of court, until it had decided against its own jurisdiction, that having so decided, the complaint is lodged with the executive, and he asks for evidence to enable that department to consider and decide finally on the subject.

It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true that when an individual claiming the property as his, had asserted that claim in a court, the executive acknowledges in itself a want of power, to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case, if instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controled by that individual. The executive can give no direction concerning it. But a public prosecution carried on in the name of the United States, can without impropriety be dismissed at the will of the government. The opinion therefore given in this letter is unquestionably correct, but it is certainly misunderstood when it is considered as being an opi-

nion that the question was not, in its nature, a question for executive decision.

In the letter to Mr. Morris the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored, but says it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department.

The principle then according to this letter is not submitted to the courts, whether a vessel captured within a given distance of the American coast was or was not captured within the jurisdiction of the United States, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tribunal shall settle the fact. In this respect a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New-York, permit me now said Mr. Marshall to ask the attention of the house to the whole course of executive conduct on this interesting subject.

It is first mentioned in a letter from the secretary of state to Mr. Genet of the 25th of June 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war, (the President being absent) in which (so well were they assured

of the President's way of thinking in those cases) it was determined, that the vessels should be detained in the custody of the consuls in the ports, "until the government of the United States shall be able to *enquire into and decide on the fact.*"

In his letter of the 12th of July 1793 the secretary writes that the President has determined to *refer* the questions concerning prizes "to persons learned in the laws." And he requests that certain vessels enumerated in the letter should not depart "until his ultimate determination shall be made known."

In his letter of the 7th of August 1793, the Secretary informs Mr. Genet that the President considers the U. States as bound to "*to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports.*" That it is consequently expected that Mr. Genet will cause restitution of such prizes to be made. And that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter brought within their ports by any of the said privateers."

In his letter of the 10th of November 1793: the Secretary informs Mr. Genet, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the Governors of the several states were requested on receiving any such claim, immediately to notify thereof the Attornies of their several districts; whose duty it would be to give notice "to the principal agents

of both parties and also to the consuls of the nations interested, and to recommend to them, to appoint by mutual consent, arbiters to decide whether the capture was made within the jurisdiction of the United States as stated in my letter of the 8th. inst. according to whose award the Governor may proceed to deliver the vessel to the one or the other party." If either party refuses to name arbiters then the attorney is to take depositions on notice, which "he is to transmit for the *information and decision of the President.*" "This prompt procedure is the more to be insisted on, as it will enable the President, *by an immediate delivery* of the vessel and cargo to the party having title, to prevent the injuries consequent on long delay."

In his letter of the twenty-second of Nov. 1793 the Secretary repeats, in substance, his letter of the 12th of July and 7th of August, and says that the determination to deliver up certain vessels, involved the brig Jane of Dublin, the brig Le ley Laff, and the brig Prince William Henry. He concludes with saying, "I have it in charge to enquire of you, sir, whether these three brigs have been given up, according to the *determination of the President*, and if they have not to repeat the requisition that they be given up to their former owners."

Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision then on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which

the gentleman from New-York has cited with such merited approbation; and which he has declared to stand on the same principles, with those which ought to have governed, in the case of Thomas Nash; which deserves the more respect, because the government of the United States was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision quoted as a precedent and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same, with that which was made in the case under consideration. It is a full authority to show, that, in the opinion always held by the American government, a case like that of Thomas Nash, is a case for Executive and not judicial decision.

The clause in the constitution which declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual, from the executive to the judicial department.

But certainly this clause in the constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of the people of Europe and Asia, or to direct and controul proceedings against criminals throughout the universe. It, can then, be designed only, to guide the proceedings of our own courts, and to prescribe the mode of punishing offences committed against the government of

the United States, and to which the jurisdiction of the nation may rightfully extend.

It has already been shown that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice, the question to be determined was not how his crime should be tried and punished but whether he should be delivered up to a foreign tribunal which was alone capable of trying and punishing him. A provision for the trial of crimes in the courts of the United States is clearly not a provision for the performance of a national compact, for the surrender to a foreign government of an offender against that government.

The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the independence of the nation, before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review and amendment of so unwise a provision. If then this clause does not extend to offences committed in the fleets and armies of the United States, how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, of the Ottoman or Russian empires?

The same argument applies to the observations on the 7th article of the amendments to the constitution. That article relates only to

trials in the courts of the United States, and not to the performance of a contract for the delivery of a murderer not triable in those courts.

In this part of the argument, the gentleman from New-York has presented a dilemma of a very wonderful structure indeed. He says that the offence of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed—if it was not a crime, he ought not to have been delivered up to a foreign government, where his punishment was inevitable.

It had escaped the observation of that gentleman, that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the United States: And that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma then, the gentleman from New-York is, himself, perfectly at liberty, to retain either form.

He has chosen to consider it as a crime, and says it has been made a crime by treaty, and is punished by sending the offender out of the country.

The gentleman is incorrect in every part of his statement. Murder on board a British frigate, is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gib-

beted, evinced to him, that the punishment of his crime was of a much more serious nature, than mere banishment from the United States.

The gentleman from Pennsylvania and the gentleman from Virginia have both contended, that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided, in its determination.

The points of law which must have been decided, are stated by the Gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided: but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not, is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled, by the misrepresentation of the constitution, made in the resolutions of the gentleman from New York: and, in consequence of being so misled, his observations have the appearance of endeavouring to fit the constitution to his arguments, instead of adapting his argument to the constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the President, he has not advanced a single step towards proving, that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

The *casus foederis* of the guaranty was a question of law, but no man would have hazarded the opinion; that such a question must be carried into court, and can only be there decided. So the *casus foederis* under the 27th article of the treaty with Britain is a question of law, but of political law. The question to be decided is whether the particular case proposed be one, in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the *casus foederis* of the 27th article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

When therefore the gentleman from Pennsylvania has established, that in delivering up

Thomas Nash, points of law were decided by the President, he has established a position, which in no degree whatever, aids his argument.

The case was in its nature a national demand made upon the nation. The parties were the two nations, They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence the demand of a foreign nation can only be made on him.

He possesses the whole executive power. He holds and directs the force of the nation. Of consequence any act to be performed by the force of a nation, is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he and he alone possesses the means of executing it.

The treaty which is a law enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed—the force of the nation, are in the hands of this person. Ought not the person to perform the object, altho' the particular mode of using the means, has not been prescribed? Congress

unquestionably may prescribe the mode ; and Congress may devolve on others the whole execution of the contract : but till this be done, it seems the duty of the executive department to execute the contract, by any means it possesses.

The gentleman from Pennsylvania contends that, altho' this should be properly an executive duty, yet it cannot be performed until Congress shall direct the mode of performance. He says that altho' the jurisdiction of the courts is extended by the Constitution, to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of causes expressly allotted to them by the constitution. The executive here says can, no more than courts,—supply a legislative omission.

It is not admitted that in the case, stated the courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. And, altho' the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

The treaty stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration. If then there was an act of Congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an assylum within the territory of the United States, should be delivered up by the United States, on the de-

mand of his Britannic Majesty, and such evidence of his criminalty, as would have justified his commitment for trial, had the offence been here committed ; could the President who is bound to execute the laws have justified a refusal to deliver up the criminal, by saying that the legislature had totally omitted to provide for the case ?

The executive is not only the constitutional department, but seems to be the proper department, to which the power in question may most wisely and most safely be confided.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the consequences resulting from such violation, seems the proper department, to be entrusted with the execution of a national contract, like that under consideration.

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely, as in the department, whose duty it is to understand precisely, the state of the political intercourse and connection between the United States and foreign nations ; to understand the manner in which the particular stipulation is explained and performed by foreign nations ; and to understand completely the state of the union ?

This department too, independent of judicial aid which may, perhaps, in some instances be called in, is furnished with a great law officer,

whose duty it is to understand and to advise, when the *casus foederis* occurs. And if the President should cause to be arrested under the treaty, an individual who was so circumstanced, as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest, before a Judge by a writ of *habeas corpus*.

It is then demonstrated, that according to the practice, and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which, rests alone with the executive department.

It remains to enquire, whether in exercising this power, and in performing the duty it enjoins, the President has committed an unauthorized and dangerous interference with judicial decisions.

That Thomas Nash was committed originally, at the instance of the British consul at Charleston, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty, between the two nations, has been already so ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would therefore, Mr. Marshall said, consider the case as if Nash, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted.

Gentleman had considered it as an offence against judicial authority, and a violation of judicial rights, to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject, as if it was the privilege of courts, to condemn to death, the guilty wretch arraigned at their bar, and that to intercept the judgement was to violate the privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal justice: It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the President expresses constitutionally the will of the nation, and may rightfully as was done in the case at Trenton, enter a nolle prosequi, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions; nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the President directed the judge at Charleston to decide for or against his own jurisdiction—to condemn or acquit the prisoner—this would have been a dangerous interference with judicial decisions and ought to have been resisted.

But no such direction has been given, nor any such decision been required. If the President determined that Thomas Nash ought to have been delivered up to the British government, for a murder committed on board a British fri-

gate, provided evidence of the fact was adduced; it was a question which duty obliged him to determine, and which he determined rightly. If in consequence of this determination he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of *Thomas Nash* would not bind as a precedent against the jurisdiction of the court. If it should even prove that, in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more: and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it could have no influence with the court in deciding on its jurisdiction.

Taking the fact then even to be, as the gentlemen in support of the resolutions would state it, the fact cannot avail them.

It is to be remembered too, that in the case stated to the President, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The President and judge seem to have entertained, on this subject, the same opinion: and in consequence of the opinion of the judge, the application was made to the President.

It has then been demonstrated.

1st. That the case of Thomas Nash, as stated to the President, was compleatly within the 27th article of the treaty between the United States of America and Great Britain.

2ly That this question was proper for executive and not for judicial decision, and

3dly That, in deciding it, the President is not chargeable with an interference with judicial decisions.

After trespassing so long Mr. Marshall said on the patience of the house, in arguing what had appeared to him to be the material points growing out of the resolutions. he regretted the necessity of detaining them still longer, for the purpose of noticing an observation, which appeared not to be considered, by the gentleman who made it, as belonging to the argument.

The subject introduced by this observation however was so calculated to interest the public feelings, that he must be excused for stating his opinion on it.

The gentleman from Pennsylvania had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. Marshall said, he concurred entirely with that gentleman. He believed the opinion to be unquestionably correct,—as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a place in the bosom of any American. He could not pre-

tend, and did not pretend, to know the opinions of the executive on the subject, because he had never heard the opinions of that department, but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken, by the conduct of the executive in this particular case.

In his own mind it was a sufficient defence of the President, from an imputation of this kind, that the fact of Thomas Nash being an impressed American, was obviously not contemplated by him in the decision he made on the principles of the case. Consequently if a new circumstance occurred, which would essentially change the case decided by the President, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory as this defence might appear, he should not resort to it, because to some it might seem a subterfuge. He defended the conduct of the President on other, and still stronger ground:

The President had decided that a *murder* committed on board a British frigate on the high seas, was within the jurisdiction of that nation, and consequently within the 27th. article of its treaty with the United States. He therefore directed Thomas Nash to be delivered to the British minister, if satisfactory evidence of the *murder* should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If Thomas Nash had committed a murder, the

decision was that he should be surrendered to the British minister, if he had not committed a murder, he was not to be surrendered.

Had Thomas Nash been an impressed American, the homicide on board the *Hermione*, would, most certainly, not have been murder.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound, could not have been treated as a murderer. Thomas Nash was only to have been delivered up to justice on such evidence as, had the fact been committed within the United States, would have been sufficient to have induced his commitment and trial for murder. Of consequence the decision of the President was so expressed, as to exclude the case of an impressed American liberating himself by homicide.

He concluded with observing that he had already too long availed himself of the indulgence of the House, to venture further on that indulgence, by recapitulating, or reinforcing the arguments which had already been urged.

F I N I S.

The following information was obtained from the records of the [illegible] Department of the Interior, Bureau of Land Management, regarding the [illegible] land grant made by the State of California to the [illegible] Company, dated [illegible].

[The remainder of the page contains several paragraphs of extremely faint, illegible text.]

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